(12)

No. 96-792

In The

Supreme Court of the United States

October Term, 1996

LYNNE KALINA,

Petitioner,

v.

RODNEY FLETCHER,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a prosecutor who acts as the complaining witness whose oath supports issuance of an arrest warrant is entitled to absolute, rather than qualified, immunity from suit under 42 U.S.C. §1983?

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CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, which provides in part:

> The right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation. . . .

This case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of . . . liberty . . . without due process of law.

STATEMENT OF THE CASE

This is a civil rights case brought under 42 U.S.C. §1983 by Respondent Rodney Fletcher against Petitioner Lynne Kalina. Mr. Fletcher's claim is that, by making false statements in an affidavit supporting a warrant for his arrest, Ms. Kalina caused him to be deprived of rights guaranteed by the Fourth and Fourteenth Amendments. *See* Complaint ¶5.1, JA 6. Ms. Kalina claims that she is absolutely immune from suit for such conduct by virtue of her position as a Deputy Prosecuting Attorney. Answer, JA 10. The courts below unanimously rejected the claim of absolute immunity. *See* Order, JA 21; *Fletcher*

v. Kalina, 93 F.3d 653 (9th Cir. 1996), JA 23-4. Ms. Kalina then petitioned this Court for certiorari.

1. The Respondent's Claim.

Rodney Fletcher's Complaint against Lynne Kalina was specific. It focused exclusively on Ms. Kalina's false declaration in support of the warrant for Mr. Fletcher's arrest. Its factual allegations, which are uncontested for purposes of this review, read as follows:

> 3.2 On or about December 14, 1992, Lynne Kalina prepared and filed a Certification for Determination of Probable Cause ("Certification"). . . .
>
> 3.3 In the Certification, defendant Lynne Kalina made false statements about Rodney Fletcher, with reckless disregard for the truth, knowing that her certification would result in Mr. Fletcher's arrest and prosecution.
>
> 3.4 In the Certification, defendant Lynne Kalina falsely accused Mr. Fletcher of breaking into the Our Lady of Guadalupe School in King County, Washington, and of committing certain acts while within the school, including damaging a vending machine and stealing property.
>
> 3.5 In the Certification, Ms. Kalina falsely stated that Mr. Fletcher had never been associated with the school and did not have permission to enter the school. In fact, Mr. Fletcher had been hired to install partitions and had performed extensive work, at and for the school, was known to the school personnel and was authorized to enter onto the premises.
>
> 3.6 In the Certification, Ms. Kalina falsely stated that Mr. Fletcher was identified from a photo montage by an eye witness. In fact, two eye witnesses failed to identify Mr. Fletcher from the photo montage and no witness identified him. These failed photo identifications were detailed specifically in the Seattle Police Department reports and statements that were available to Ms. Kalina at the time that she prepared the Certification.
>
> 3.7 Pursuant to the recitations in the Certification, an arrest warrant was issued for Rodney Fletcher and on September 24, 1993, Mr. Fletcher was arrested on a charge of Burglary in the Second Degree.

Complaint, JA 5-6. Mr. Fletcher's legal contention was that, by these actions, Ms. Kalina caused him to be denied "the right to be free from unreasonable seizures and from deprivation of liberty, without due process of the law, guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States. . . . " JA 6.

2. The Petitioner's Defense.

Petitioner Kalina's answer denied the main factual allegations in Mr. Fletcher's complaint, and demanded a jury trial on them. JA 8-9. In addition, as affirmative defenses, Ms. Kalina alleged that she was "immune from suit based on the doctrine of absolute prosecutorial immunity" and, in the alternative, that she had "acted in good faith in the performance of her duty and is therefore qualified[ly] immune." JA 10.

Shortly after her answer was filed, and before any discovery was done, Ms. Kalina filed a motion for summary judgment on her claim of absolute immunity. The

motion was supported by an affidavit which did not contest any of the factual allegations in Mr. Fletcher's complaint, but described the sequence of events leading to the issuance of the warrant for Mr. Fletcher's arrest. JA 11-12. In this affidavit, Ms. Kalina acknowledged that she had prepared and signed the certification on which the warrant for Mr. Fletcher's arrest was issued, before any charges were actually filed against him. JA 12. She said she later filed the certification, along with an Information charging Mr. Fletcher with second degree burglary, and a motion and proposed order to issue a warrant for his arrest. JA 12-20.

Ms. Kalina "did not personally appear in court when the warrant was issued". Pet. Brief 24. However, she claimed absolute prosecutorial immunity from Mr. Fletcher's claim because

> the filing of the information and request for the arrest warrant were done contemporaneously as a part of the initiation of the prosecution against Mr. Fletcher.

JA 12. She did not explain why she decided to act as the affiant for the arrest warrant,[1] or why she swore to the falsehoods her affidavit contained.

[1] Attached to Ms. Kalina's affidavit was, among other documents, a sworn police report which apparently was filed along with the arrest warrant application. *See* JA 17. This police report, the contents of which did not support probable cause, was signed under penalty of perjury under RCW 9A.72.085, as was Ms. Kalina's probable cause certification (JA 20).

3. The Decisions Below.

The District Court denied Ms. Kalina's motion, holding her actions were not covered by her absolute immunity. JA 21. Ms. Kalina appealed interlocutorily, and the Court of Appeals unanimously affirmed, holding she was "not immune for her actions in filing a declaration for an arrest warrant," but "emphasiz[ing] that Kalina may be able to avoid liability by showing at trial that her conduct did not violate a clearly established right of which a reasonable person would have known." JA 28.

SUMMARY OF ARGUMENT

This Court's decisions establish a presumption in favor of granting state officials qualified immunity, rather than absolute immunity, from suits for violations of civil rights. Petitioner and her *amici* would have the Court ignore that presumption and extend absolute immunity to officials who act as complaining witnesses providing the "oath or affirmation" supporting an arrest warrant – but only when those officials are public prosecutors or their investigators. To do that would be contrary to this Court's prior decisions, to the historical and common law basis for allowing prosecutors immunity from civil rights lawsuits, and to sound policy.

1. As the courts below held, this case is controlled by *Malley v. Briggs*, 475 U.S. 335 (1986) and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

Malley held that a police officer who did exactly what Petitioner did – caused a person to be seized by submitting a

sworn statement in support of a complaint and request for an arrest warrant – was entitled to qualified, rather than absolute, immunity. In so holding, the Court applied a "functional approach" which focuses on the nature of the function that caused the alleged violation, rather than the status of the person who performed it.

The function performed by the Petitioner in this case (and in *Malley*) was an ancient one – the function of a complaining witness providing the "oath or affirmation" required by the Fourth Amendment for issuance of a warrant of arrest. It was Petitioner's oath that caused Mr. Fletcher's wrongful arrest. Without an oath, for all her advocacy, she could cause no warrant to issue. At common law, in 1871 and long before, it was well established that persons who provided such an oath could be sued for doing so falsely or maliciously and without probable cause.

The courts below properly held, in light of *Malley* and this common law history, that a higher level of immunity could not be accorded a defendant solely because she is employed as a deputy prosecuting attorney. They were fortified in that position by *Buckley*, which denied a prosecutor absolute immunity for conduct that also closely resembles that for which Petitioner was sued: fabricating evidence to support yet unfiled charges. Their decisions correctly applied these controlling precedents.

2. Petitioner seeks to avoid this conclusion by subtly modifying this Court's "functional approach" to absolute immunity claims. That approach focuses on the conduct for which the defendant has been sued, rather

than the role in which the defendant performed it. Petitioner would have the Court change that approach to focus on the "function of the function," the purpose for which the defendant took the challenged action.

This modification has already been rejected by this Court. It would make the immunity issue turn on the defendant's status, or her intentions, rather than the conduct by which she caused the alleged civil rights violation. To make the outcome turn on status would be to discard the functional analysis. To make the issue turn on the defendant's intentions would run contrary to the nature and purpose of absolute immunity. Moreover, even if the issues were made to turn on the defendants' intentions, it would make no difference here, for Petitioner's intentions were exactly the same as the defendant in *Malley v. Briggs*: to get a warrant to seize and bring to court a person she was accusing of a crime.

3. To the extent these circumstances present a conflict between two longstanding general principles – complaining witnesses can be sued but prosecutors are immune – the conflict is appropriately resolved in favor of the former, older rule, which was the law in 1871 and well before. In reality, however, there is no conflict. Swearing on oath as a complaining witness on an arrest warrant is not traditionally a prosecutor's function. It is not "advocacy" and it is not "judicial." It is not part of a prosecutor's job in most jurisdictions, and is not even a prosecutorial function under the law of the State of Washington. It does not resemble the discretionary functions for which prosecutors are given special protection from civil rights suits, and should not be included among

them. The function of a witness is to tell the truth, not to exercise discretion.

4. There is no compelling reason to expand the scope of absolute immunity to cover prosecutors who take on the role of complaining witnesses. Prosecutors need not perform this function. If they choose to have defendants arrested (rather than haled into court by summons, which implicates no constitutional right) they can easily, and more accurately, support their requests for arrest warrants with affidavits from police officers. If they choose nonetheless to provide the required oath for an arrest warrant themselves, they are adequately protected by the same qualified immunity that covers police officers who do the same thing. Prosecutors who act responsibly should rarely, if ever, face lawsuits for that conduct; and those few suits that are brought can be easily resolved, as the factual and legal issues they present will be narrow. Concern about such lawsuits should cause little distraction to prosecutors who elect to perform a function that (at least theoretically) exposes them to professional discipline, and even prosecution, for willful malfeasance.

Permitting prosecutors to cause arrests based on no "oath or affirmation" but their own, and then cloaking their abuses of that power with absolute immunity, would leave innocent citizens like Rodney Fletcher without any legal remedy, even for the most egregious official misconduct. The law has never allowed that and should not be changed to allow it now.

ARGUMENT

I. THERE IS A PRESUMPTION IN FAVOR OF QUALIFIED IMMUNITY AND AGAINST ABSOLUTE IMMUNITY FOR OFFICIALS WHO VIOLATE CIVIL RIGHTS.

The precedential framework in which this case arises was well described by the opinion of the Court in *Buckley v. Fitzsimmons*, 509 U.S. 259, 267-69 (1993):

> The principles applied to determine the scope of immunity for state officials sued under Rev.Stat. §1979, as amended, 42 U.S.C. §1983 are by now familiar. Section 1983, on its face admits of no defense of official immunity. It subjects to liability "[e]very person" who, acting under color of state law, commits the prohibited acts. In *Tenney v. Brandhove*, 341 U.S. 367, 376, 71 S.Ct. 783, 788, 95 L.Ed. 1019 (1951), however, we held that Congress did not intend §1983 to abrogate immunities "well grounded in history and reason." Certain immunities were so well established in 1871, when §1983 was enacted, that "we presume that Congress would have specifically so provided had it wished to abolish" them. *Pierson v. Ray*, 386 U.S. 547, 554-555, 87 S.Ct. 1213, 1217-1218, 18 L.Ed.2d 288 (1967). *See also Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258, 101 S.Ct. 2748, 2755, 69 L.Ed.2d 616 (1981). Although we have found immunities in §1983 that do not appear on the face of the statute, "[w]e do not have a license to establish immunities from §1983 actions in the interests of what we judge to be sound public policy." *Tower v. Glover*, 467 U.S. 914, 922-923, 104 S.Ct. 2820, 2826, 81 L.Ed.2d 758 (1984). "[O]ur role is to interpret the intent of Congress in enacting

§1983, not to make a freewheeling policy choice." *Malley v. Briggs*, 475 U.S. 335, 342, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986).

Since *Tenney*, we have recognized two kinds of immunities under §1983. Most public officials are entitled only to qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 102 S.Ct. 2727, 2732, 73 L.Ed.2d 396 (1982); *Butz v. Economou*, 438 U.S. 478, 508, 98 S.Ct. 2894, 2911, 57 L.Ed.2d 895 (1978). Under this form of immunity, government officials are not subject to damages liability for the performance of their discretionary functions when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S., at 818, 102 S.Ct., at 2738. In most cases, qualified immunity is sufficient to "protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Butz v. Economou*, 438 U.S., at 506, 98 S.Ct., at 2911.

We have recognized, however, that some officials perform "special functions" which, because of their similarity to functions that would have been immune when Congress enacted §1983, deserve absolute protection from damages liability. *Id.*, at 508, 98 S.Ct., at 2911. "[T]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Burns v. Reed*, 500 U.S., at 486, 111 S.Ct., at 1939; *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432, and n. 4, 113 S.Ct. 2167, ___, and n. 4, 124 L.Ed.2d 391 (1993). Even when we can identify a common-law tradition of absolute immunity for a

> given function, we have considered "whether §1983's history or purposes nonetheless counsel against recognizing the same immunity in §1983 actions." *Tower v. Glover*, 467 U.S., at 920, 104 S.Ct., at 2825. Not surprisingly, we have been "quite sparing" in recognizing absolute immunity for state actors in this context. *Forrester v. White*, 484 U.S. 219, 224, 108 S.Ct. 538, 542, 98 L.Ed.2d 555 (1988).

See also Wyatt v. Cole, 504 U.S. 158, 163-64 (1992).

"The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns v. Reed*, 500 U.S. at 486-87 (internal quotation marks and citations omitted). That presumption can be overcome only by a showing by the official defendant that the conduct for which he seeks immunity would have been privileged at common law in 1871, and that a grant of immunity would be consistent with the purposes of §1983. "Thus, if application of the principle is unclear, the defendant simply loses." *Buckley v. Fitzsimmons*, 509 U.S. at 281 (concurring opinion of Justice Scalia).

Petitioner has failed utterly to overcome this presumption.

II. PETITIONER WAS SUED FOR MAKING FALSE STATEMENTS AS A COMPLAINING WITNESS ON AN ARREST WARRANT AFFIDAVIT, NOT FOR PERFORMING A PROSECUTORIAL FUNCTION.

"In determining whether particular actions of government officials fit within a common-law tradition of

absolute immunity, or only the more general standard of qualified immunity, we have applied a 'functional approach,' *see, e.g., Burns*, 500 U.S., at 486, 111 S.Ct., at 1939, which looks to 'the nature of the function performed, not the identity of the actor who performed it,' *Forrester v. White*, 484 U.S., at 229, 108 S.Ct., at 545." *Buckley v. Fitzsimmons*, 509 U.S. at 269.

Petitioner Kalina performed more than one function with respect to Rodney Fletcher's prosecution and arrest.[2] One of her functions was clearly prosecutorial: preparing and signing the Information by which Mr. Fletcher was charged. *See Imbler v. Pachtman*, 424 U.S. 409, 431 (1996). That was not the function for which Mr. Fletcher sued her, however; his Complaint contains no allegations of misconduct with respect to the filing of the charges against him. *See* Complaint, JA 4-6. Petitioner Kalina was "sued under §1983 for false arrest," *Malley v. Briggs*, 475 U.S. at 340, not for malicious prosecution.

Nor does Mr. Fletcher's Complaint allege that Ms. Kalina acted improperly in requesting a warrant for his arrest. It was not the request for a warrant that caused Mr. Fletcher's arrest – for if that request had been made without Ms. Kalina's false sworn statements, it would have been denied, for the court could not have found probable cause. *See Giordenello v. United States*, 357 U.S. 480, 485 (1958); *State v. Klinker*, 85 Wn.2d 509, 517, 537 P.2d 268 (1975). Mr. Fletcher's Complaint thus focuses on this one aspect of Petitioner Kalina's conduct – the fact

[2] A prosecutor may perform more than one function in a single case, some covered by qualified immunity and others not. *Burns v. Reed*, 500 U.S. 478, 492 (1991).

that she made false statements under oath to cause his arrest, JA 5-6 – because that is what harmed him. It was with regard to this function, and this function only, the courts below rejected Ms. Kalina's claim of absolute immunity: "we hold that a prosecutor is not absolutely immune when preparing a declaration in support of an arrest warrant."[3] It is with regard to this function, not the varieties of true prosecutorial conduct to which the Briefs of Petitioner and her *amici* repeatedly refer,[4] this case should be decided.

[3] JA 26; *see also* JA 27 ("Kalina's actions in writing, signing and filing the declaration for an arrest warrant are virtually identical to the police officer's actions in *Malley*."); JA 23 ("whether a state prosecutor who allegedly made false statements in an affidavit supporting an application for a search warrant should be accorded absolute immunity"); JA 28 ("Kalina is not absolutely immune for her actions in filing a declaration for an arrest warrant.").

[4] Petitioner's formulation of the Question Presented, which refers generically to "the prosecutor's conduct in causing an arrest warrant to issue" (Pet. Brief i), reflects her discomfort in discussing the specific form of "conduct" to which this lawsuit and the decisions below were limited. The formulations by most of her *amici* similarly obscure the issue, *see* Brief of the National District Attorneys Association at i ("conduct in the function of obtaining an arrest warrant"), Brief of the National Association of Counties, Etc., at i ("conduct in seeking an arrest warrant"), or attempt to completely change the subject, *see* Brief of the United States as Amicus Curiae at I ("requesting the issuance of an arrest warrant"). Petitioner's arguments similarly steer away from the specific conduct involved here, and toward more general, prosecutorial activities such as "Requesting an Arrest Warrant in Conjunction with the Filing of an Information," "Initiat[ing] Criminal Charges and Seek[ing] an Arrest Warrant," and "Appl[ying] for an Arrest Warrant to Insure that the Defendant is Available for Trial." Pet. Brief iv.

A. A Functional Analysis Focuses on the Nature of the Challenged Conduct, Not its Purpose.

Petitioner's evasions regarding the function for which she was sued reflect the central problem with her position in this appeal: "Kalina's actions in writing, signing and filing the declaration for an arrest warrant are virtually identical to the police officer's actions in *Malley*." JA 27. Since "it is the nature of the function performed, not the identity of the actor who perform[s] it, that inform[s] [the Court's] immunity analysis," *Burns v. Reed*, 500 U.S. at 506 (concurring and dissenting opinion of Justice Scalia), *quoting Forrester v. White*, 484 U.S. 219, 229 (1988), *Malley* controls this case unless Ms. Kalina's function can somehow be distinguished from Officer Malley's.

Petitioner attempts to do this by asking this Court to add a step to its "functional analysis" of immunity issues, a step that would focus on "the nature and function of a particular act, not on the act itself." Pet. Brief at 20. Rather than looking to "the function" of the *act*, Petitioner's test would look to "the function each *actor* performs in the criminal justice system." *Id.* at 22 (emphasis added).

This Court has previously rejected this argument. *Buckley v. Fitzsimmons, supra*. It has consistently held that the scope of absolute immunity under §1983 depends on "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White*, 484 U.S.

219, 229 (1988).[5] Its "functional approach" focuses on "conduct,"[6] not position or intent. Shifting the focus from the function itself to the "function of the function" would eviscerate functional analysis.

Focusing not on the conduct but on the actor's intentions in engaging in it would undermine the very purpose of absolute immunity – avoiding inquiry into the actor's subjective intentions. *See Mirales v. Waco*, 502 U.S. at 11; *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). If a prosecutor is immune when she swears out an affidavit for an arrest warrant "to aid the trial court's exercise of personal jurisdiction over a charged defendant" (Pet. Brief 20), what if it is alleged that was not her purpose? What if it is claimed that her purpose was to harass the

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[5] *See Burns v. Reed*, 500 U.S. at 495 (denying absolute immunity to prosecutor performing function for which police officers receive only qualified immunity); *Buckley v. Fitzsimmons*, 509 U.S. at 273 ("[T]he actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor. . . . When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.").

[6] *Buckley v. Fitzsimmons*, 509 U.S. at 271, 272. *See id.* at 270 (discussing *Imbler v. Pachtman*, regarding "initiating a prosecution and presenting the state's case," and *Burns v. Reed* regarding "giving legal advice to the police"); *id.* at 271 (quoting *Burns* regarding "appearing before a judge and presenting evidence"); *see also, e.g., Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 434 (1993) ("producing a 'verbatim' transcript of each session of the court"); *Mirales v. Waco*, 502 U.S. 9, 13 (1991) ("directing police officers to bring counsel to court"); *Stump v. Sparkman*, 435 U.S. 349, 362 (1978) ("approv[ing] petitions relating to the affairs of minors").

person arrested, or to penalize him for refusing to cooperate with the government, or to squeeze a confession from him, or to permit police to conduct a warrantless search of his person, or to settle some private score with him? Either the court must conclusively presume that, because the act was done by a prosecutor (rather than a police officer)[7] its purpose is always proper and "judicial" (thereby making the issue turn on "the identity of the actor") or it must permit inquiry into actual subjective motivation, making the immunity no longer absolute.

Conversely, what if the prosecutor alleges that her purpose in engaging in conduct that is *not* protected by absolute immunity – holding a postindictment press conference, for example – was to aid in the defendant's apprehension to bring him before the court, or to attract the attention of potential witnesses, or to inform victims of the crime about developments in the case? In *Buckley v. Fitzsimmons*, this Court did not let such subjective arguments overcome the fact that the act of making out-of-court press statements is not inherently prosecutorial, and was not protected at common law. 509 U.S. at 276-77. It should not do so here. Converting the "functional approach" into an inquiry into motive or purpose would make it totally unworkable.

Moreover, a subjective inquiry would not aid Petitioner's case, for there is no difference between the function or purpose of Ms. Kalina's warrant request and

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[7] Additionally, of course, making the test for immunity turn on "purpose" would beg the converse question of why absolute immunity would not extend to police officers, or others, if their intent was "prosecutorial". *See* page 17, below.

Officer Malley's. As the Court of Appeals observed, Ms. Kalina filed her arrest warrant affidavit along with a felony information; Officer Malley filed his along with a felony complaint. JA 27 n.2. The purpose of both actions was to bring the arrested person under court jurisdiction. *See Malley v. Briggs*, 475 U.S. at 337. Indeed, no other purpose could be claimed: except in unusual circumstances not presented here, arrests are justified only in order to bring a person believed to have committed a crime before the court to face charges. "Arrests for investigation" are as illegal in Washington as they are elsewhere.[8] All arrest warrants in Washington, whether obtained by police or by prosecutors, "command the defendant be arrested and brought forthwith before the court issuing the warrant." Washington CrR 2.2(c).[9] Thus, even if the "purpose" or "function" of an arrest were controlling, there is no difference between this case and *Malley*.

Malley differs from this case only in that the affiant whose oath supported the arrest warrant was a deputy

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[8] *State v. Ellison*, 77 Wn.2d 874, 877, 467 P.2d 839 (1970); *see Bowling v. United States*, 350 F.2d 1002, 1003 (D.C. Cir. 1965); *Gatlin v. United States*, 326 F.2d 666, 670-71 (D.C. Cir. 1963); *Simpson v. United States*, 346 F.2d 291, 293 (10th Cir. 1965).

[9] *Accord*, Washington Crim. Rule for Courts of Limited Jurisdiction 2.2(c). *See also* RCW 10.31.030 (requiring an officer making an arrest under warrant to take the arrested "person directly and without delay before a judge or before an officer authorized to take the recognizance. . . . "). Even persons arrested without warrants must be taken to court as soon as practicable. *See* Wash. CrR 3.2B(a)(1); Wash. CrRLJ 3.2.1; *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

prosecuting attorney rather than a police officer. JA 27.[10] Because that does not change the analysis, Petitioner's claim of absolute immunity must be rejected, just as was Officer Malley's.

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[10] Neither can *Malley* sensibly be distinguished from this case on the ground that *Malley* involved conduct occurring prior to the "judicial phase" of the case, as Petitioner and some of her amici alternatively suggest. *See* Pet. Brief 18-19; Brief of Maryland et al. at 4-5. For one thing, the idea that there is such a conclusive demarcation was squarely rejected in *Buckley*, by the Court's unanimous denial of absolute immunity to postindictment press statements. *Buckley v. Fitzsimmons*, 509 U.S. 278, 279, 282. Moreover, both this case and *Malley* sit right on the line, not on one side of it or the other. Officer Malley, just like Ms. Kalina, submitted an affidavit and other documents to a judge, who signed the arrest warrant. *Malley v. Briggs*, 475 U.S. at 335. Officer Malley's other documents included "felony complaints"; Ms. Kalina's included an Information. There may (or may not) be a difference between those species of documents with respect to the Sixth Amendment question of whether a "criminal prosecution" had begun; but there is none which affects the Fourth Amendment right to a warrant and probable cause. *Gerstein v. Pugh*, 420 U.S. 103 (1975). Nor can it make a difference that Ms. Kalina made a "prosecutorial" determination of probable cause (as opposed to Officer Malley's police determination). *See* Pet. Br. 21-22. To so contend ignores the Fourth Amendment's requirement of warrants issued by neutral magistrates rather than prosecutors, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *State v. Klinker*, 84 Wn.2d 516-19. It also runs contrary to the sensible common law rule that immunities cannot be conferred on oneself by one's own legal advice. *Epstein v. Berkowsky*, 64 Ill. App. 498 (1896).

B. Swearing Out Arrest Warrant Affidavits is not a Prosecutorial Function.

This Court has heretofore granted absolute immunity only to purely prosecutorial functions such as "initiating a prosecution and in presenting the State's case," *Imbler v. Pachtman*, 424 U.S. at 431, or "appearing before a judge and presenting evidence" from law enforcement officers in a hearing on an application for a search warrant, *Burns v. Reed*, 500 U.S. at 491. "Those actions clearly involve the prosecutor's role as advocate for the State. . . . " *Ibid.*

Swearing to facts in an arrest warrant affidavit is neither advocacy nor a traditional prosecutorial function. Even with the greatly expanded power and prerogative most jurisdictions give prosecutors in modern practice, prosecutors generally do not take on the role of complaining witnesses. Washington prosecutors' common, informal practice of taking this role appears to be a historical and professional aberration. Providing oaths for warrants does not appear in descriptions of the function of the office of public prosecutor.[11] As the Solicitor General's Brief acknowledges, "federal prosecutors typically do not personally attest to the facts in . . . an affidavit filed in support of an application for an arrest warrant. . . . " Brief of the United States as Amicus Curiae at 7. Neither do prosecutors in most other states, as far as we can determine.[12]

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[11] *See, e.g.*, Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. LAW & CRIMINOLOGY 717, 728-763 (1996); ABA Standards for Criminal Justice, *The Prosecution Function* (3d ed. 1993).

[12] Our own informal (and admittedly incomplete) survey has identified only one other state – Nebraska – where prosecutors routinely take on this role. If there were many

This function is not even officially assigned to prosecutors by Washington law. Ms. Kalina's "Certification" was submitted pursuant to Washington Criminal Rule 2.2(a), which does not require, or even suggest, that the "complainant" whose oath must support an arrest warrant should be a prosecutor.[13] As the panel opinion noted, under Washington law the certification could as easily have been signed by "a police officer or complaining witness".[14] In fact, ironically, Ms. Kalina's certification was accompanied by a sworn police report (JA 17); but that police report did not make out probable cause, because, unlike Ms. Kalina's certification, it did not misstate facts.

The law does not assign the role of complaining witness to prosecutors because the role of a witness is to tell the truth, not to advocate. Washington law is consistent with this: contrary to Petitioner's characterization, it does not consider sworn statements "pleadings",[15] and

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others, we assume that would have been mentioned in one of the briefs of Petitioner's many prosecutor/*amici*.

[13] Even King County Local Rule 2.2, which Petitioner cites (Pet. Brief 5) does not equate the prosecutor's summary of the facts with a warrant affidavit, or require that it be sworn. *See* Pet. Brief 14a.

[14] JA 27. The panel consisted of Senior Judge Eugene Wright, who wrote the opinion, and Judges Robert Beezer and Diarmuid O'Scannlain. Judges Wright and Beezer are from Washington State; Judge Wright is a former Washington Superior Court Judge. *Accord*, Ferguson, *Washington Criminal Practice and Procedure* § 2745 at 39 (1984) ("[T]he person [must] be legally qualified as a witness").

[15] *See* Pet. Brief 5-7; *but see Brady v. Yount*, 42 Wn.2d 697, 699, 258 P.2d 458 (1953) ("An affidavit is not a pleading . . . ").

generally does not let lawyers testify and argue in the same proceeding. Washington Rule of Professional Conduct 3.7. Nor can the role of a witness be characterized as "quasi judicial", or an occasion for the exercise of discretion. Judges cannot testify in hearings over which they preside,[16] and a complaining witness has no discretion to do other than tell the truth in the "oath or affirmation" she provides. Where there is no discretion there is no justification for absolute immunity. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. at 436. There is no historical or institutional reason to shield with absolute immunity complaining witnesses who fail to do their legal duty to tell the truth under oath, just because those witnesses happen also to be deputy prosecutors.

III. COMPLAINING WITNESSES WHO MAKE FALSE STATEMENTS IN ARREST WARRANT AFFIDAVITS HAVE NEVER BEEN GIVEN ABSOLUTE IMMUNITY.

Ever since the Fourth Amendment was enacted to require an "oath or affirmation" supporting probable cause to arrest, persons who supplied that oath falsely and maliciously have been answerable in damages. Nothing in this Court's §1983 case law holds otherwise, as to prosecutors or anyone else.

Washington law provides specifically that "[n]o pleading other than an . . . information" is required to bring a felony charge. RCW 10.37.010.

[16] *See State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 21, 482 P.2d 775 (1971); Washington Rule of Evidence 605.

A. The Common Law.

"[C]omplaining witnesses were not absolutely immune at common law. In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause. Given malice and the lack of probable cause, the complainant enjoyed no immunity." *Malley v. Briggs*, 475 U.S. at 340-41 (footnote omitted).

There were no exceptions to this rule for public prosecutors in 1871. "Indeed, as [the Court has] . . . previously recognized, *see Imbler v. Pachtman*, 424 U.S. 409, 421, 96 S.Ct. 984, 990, 47 L.Ed.2d 128 (1976), the first case extending *any* form of prosecutorial immunity was decided some 25 years after the enactment of §1983." *Burns v. Reed*, 500 U.S. at 499 (concurring and dissenting opinion of Justice Scalia) (original emphasis).[17]

That "first case," *Griffith v. Slinkard*, 44 N.E.1001 (Ind. 1896), rested on the idea that a prosecutor is "a judicial officer" who could not be held liable for "his own judgment" or any "judicial determination, however erroneous it may be, and however malicious the motive which produced it." *Id.* at 1003. Cases that followed *Griffith* rested

[17] Although the common law cases cited in *Malley* (*id.* at 341 n.3) did not involve *public* prosecutors (an office that hardly existed at the time), they did involve *private* "prosecutors", and often referred to the defendants as such. *See, e.g., Dinsman v. Wilkes*, 53 U.S. 390, 402 (1852), *quoting* 3 W. Blackstone Commentaries 126 (1765); *Randall v. Henry*, 5 Stew. & P. 367, 375-380 (Ala. 1834), and cases there cited.

on similar grounds.[18] Only one of these early cases involved a prosecutor who, like Petitioner, was sued for allegedly making "false representations induced a judge to issue a warrant of arrest." *Leong Yau v. Carden*, 23 Hawaii 362, 364 (1916). While recognizing the general rule that a public prosecutor "cannot be called upon to respond in damages for the honest exercise of his judgment within his jurisdiction," the court in *Leong Yau* refused to extend absolute "judicial" immunity to that case. *Id.* at 364-5.[19]

Thus, as *Malley* held, there was no settled "immunity at common law that Congress intended to incorporate in the Civil Rights Act," *Wyatt v. Cole*, 504 U.S. 158, 164 (1992), for wrongful arrests caused by false oaths or affirmations. Nor were there other categories of common-law immunity which would likely have extended to such

[18] *See Smith v. Parman*, 165 Pac. 663 (Kan. 1917) ("The public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury"); *Watts v. Gerking*, 228 Pac. 135, 139 (Ore. 1924) (prosecuting attorneys "like grand jurors, . . . are vested with some discretion and judgment," and are therefore immune from suit for filing criminal charges without probable cause); *Yaselli v. Goff*, 12 F.2d 396, 404 (2d Cir. 1926), *affirmed* 275 U.S. 503 (1927) ("the public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury"). *See also Kendall v. Stokes*, 44 U.S. 87, 98 (1845) ("a public officer is not liable to an action . . . in relation to which it is his duty to exercise judgment and discretion").

[19] Cf. *Schneider v. Sheperd*, 192 Mich. 82, 158 N.W. 182, 184 (1916) (prosecutor "was not entitled to the immunity of a quasi-judicial officer" for "instigating the arrest of the plaintiff" without a warrant or probable cause).

conduct by a prosecutor, had the case arisen. *See Burns v. Reed*, 500 U.S. at 499 (concurring and dissenting opinion of Justice Scalia). Common law "judicial immunity" would not apply to such conduct (as it would to the decision to prosecute itself) because it involves "no adjudication of rights." *Id.* at 504. Nor would the absolute immunity from defamation claims based on statements in judicial proceedings – for the common law universally allowed such suits for malicious prosecution or false arrest against "complaining witnesses who . . . set the wheels of government in motion by instigating a legal action", *Wyatt v. Cole*, 504 U.S. at 164-65, even though those same witnesses could not be sued for defamation in their testimony or arguments at trial. At best, such complaining witnesses could claim "quasi-judicial" immunities; but such immunities were qualified, not absolute. *See Burns v. Reed*, 500 U.S. 500 (concurring and dissenting opinion of Justice Scalia). That is what *Malley* extended to police officers who take on that role; and that is what the courts below granted Petitioner. She would have received no more at common law.

B. This Court's Cases.

This Court's modern decisions regarding absolute immunity from suit under §1983 have been consistent with the common law in this respect. Although the Court has granted public prosecutors broader immunity than they were afforded by any decision prior to 1871, it has never granted absolute immunity from suit for civil rights violations that would have been actionable then.

Imbler v. Pachtman "h[e]ld only that in initiating a prosecution and presenting the State's case, the prosecutor is immune from a civil suit for damages under §1983", and granted absolute immunity to a prosecutor's "decision to initiate a prosecution" and the exercise of "discretion in the conduct of the trial and the presentation of evidence." 424 U.S. at 431, 421, 426. In so doing, it drew on two well established lines of common law immunity, judicial[20] immunity, and the immunity of lawyers from suits for defamation for "courtroom statement[s]" and "briefs and pleadings."[21] In *Burns v. Reed*, the Court applied the immunity established in *Imbler* to the questioning of a police witness at a pretrial hearing on a search warrant application – an action which, like questioning witnesses at a trial, "clearly involve[d] the prosecutor's role as an advocate for the State. . . . " 500 U.S. at 491.

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[20] "[A]ll three officials – judge, grand juror, and prosecutor – exercise a discretionary judgment on the basis of evidence presented to them." 424 U.S. at 423 n.20. "A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court." *Id.* at 424. "[A] prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation." *Id.* at 425. "A prosecutor often must decide . . . whether to proceed to trial where there is a sharp conflict in the evidence." *Id.* at 426 n.24. "A prosecuting attorney is required, constantly . . . to make decisions on a wide variety of sensitive issues." *Id.* at 431 n.33.

[21] *Id.* at 426 n.23. As the Court recognized in *Imbler*, the common law defamation immunity extended to witnesses as well as lawyers, *see Briscoe v. LaHue*, 460 U.S. 325 (1983), and to private as well as public counsel. Yet the Court has not accorded *any* immunity to private lawyers, or private individuals, who instigate legal actions under color of state law. *Wyatt v. Cole*, *supra*.

Neither of these decisions eliminated from the "species of tort liability" created by Congress in §1983, *Imbler v. Pachtman*, 424 U.S. at 417, a cause of action relating to the violation of civil rights that was clearly recognized at common law. In other cases, the Court has taken pains to preserve those causes of action. *Malley* did so with regard to suits for the false procurement of arrest warrants by police officers, in recognition of their deep common law roots. *Malley v. Briggs*, 475 U.S. at 340-343. *Buckley v. Fitzsimmons* did so with regard to out-of-court defamatory statements and the pretrial fabrication of evidence, functions it found lay outside a prosecutor's traditionally recognized "role as an advocate for the State." 509 U.S. at 273.

In sum, the Court's decisions in this area are true to Congress' language and presumed intent in enacting §1983. With few if any exceptions, every person acting under color of state law who causes another to be deprived of constitutional rights, through conduct that was civilly actionable in 1871, is subject to suit under this federal law. Petitioner would have this Court change that. There is no justification in history or precedent for doing so.

C. The Decisions of Lower Federal Courts.

Neither is it true, as Petitioner and her *amici* claim, that the lower federal courts are in disagreement over the issue presented here, and the decision below is aberrational. In fact, all but one of the cases that have considered the specific conduct for which Petitioner was sued – swearing an oath in support of an arrest warrant – have

reached the same conclusion as the courts below: that such conduct is covered by qualified, rather than absolute, immunity, whatever official engages in it.

Most of the lower court cases Petitioner cites involved different kinds of conduct – truly prosecutorial, advocative functions like those at issue in *Imbler* and *Burns*. Typically, the claims in those cases involved challenges to decisions to file charges or seek warrants, or to the presentation of the testimony of witnesses.[22] Where, as here, the claim is that the prosecutor himself acted as the witness and swore falsely, most courts have found, as did the court below, that the case is directly controlled by

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[22] *See, e.g., Joseph v. Patterson*, 795 F.2d 549, 555 (6th Cir. 1986) (absolute immunity for obtaining criminal complaints and arrest warrants based on allegedly false statements from a witness; "[t]he decision to file a criminal complaint and seek issuance of an arrest warrant are quasi-judicial duties"); *Lerwill v. Joslin*, 712 F.2d 435, 437-38 (10th Cir. 1983) (absolute immunity for "acting as an advocate for the State," "present[ing] . . . arguments to a justice of the peace," and "seeking a warrant for . . . arrest"); *Erlich v. Giuliani*, 910 F.2d 1220, 1224 (4th Cir. 1990) (absolute immunity for preparing a seizure warrant); *Schrob v. Catterson*, 948 F.2d 1402, 1413, 1417 (3rd Cir. 1991) (absolute immunity for "the preparation of an application for the search warrant" and for allegedly false statement in colloquy during warrant application, citing "lawyers['] . . . absolute immunity at common law for making false and defamatory statements in judicial proceedings"); *Peña v. Mattox*, 84 F.3d 894, 896 (7th Cir. 1996) (absolute immunity for "drafting or authorization of . . . criminal complaint [signed by the alleged victim's father] . . . procuring of the warrant" and requesting bail increases and punishment conditions); *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1149 (2d Cir. 1995) (absolute immunity for various alleged acts, including "misrepresentations," but no allegation of false swearing or procurement of an arrest).

Malley. In *Kohl v. Casson*, 5 F.3d 1141 (8th Cir. 1993), the court agreed that a prosecutor is absolutely immune for appearing before a judicial officer to present evidence or argue the law in support of an arrest warrant, but nonetheless held:

> [W]here the prosecutor switches functions from presenting the testimony of others to vouching, of his own accord, for the truth of the affidavits presented to the judicial officer, the prosecutor loses the protection of absolute immunity and enjoys only qualified immunity, just as the police officer was held to have in *Malley*.

5 F.3d at 1146. Similarly, in *Ireland v. Tunis*, ___ F.3d ___, 1997 WESTLAW 250434 (6th Cir., May 15, 1997), the court gave absolute immunity to prosecutors' decision to seek an arrest warrant, and their conduct in doing so – but refused to extend that immunity to the swearing out of warrant affidavits.

> [W]hen a prosecutor or other official switches from presenting the charging document to vouching personally for the truth of the contents of the document, we believe the protection afforded by absolute immunity must give way to a qualified immunity inquiry. . . . Absolute immunity at common law did not extend to complaining witnesses who "set the wheels of government in motion by instigating a legal action." *Wyatt v. Cole*, 504 U.S. 158, 164-65, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992); see also *Malley*, 475 U.S. at 340-41, 342 ("We do not find a comparable [common-law] tradition of absolute immunity for one whose complaint causes a warrant to issue"; "the generally accepted rule

> was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause." (footnote omitted)). In *Malley*, the Supreme Court observed that the action of an "officer applying for a warrant . . . while a vital part of the administration of criminal justice, is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment." *Malley*, 475 U.S. at 342-43. For these reasons, we believe that the only level of protection from suit that is potentially available when an official vouches for the truth of the contents of a criminal complaint is qualified immunity.

Id. at *12 (footnote and citations omitted).

The only contrary Circuit decision is the one that brought this case here, *Roberts v. Kling*, 104 F.3d 316 (10th Cir. 1997). Ironically, *Roberts* (like *Ireland*) involved not a prosecutor but "an investigator for the district attorney's office". 104 F.3d at 318. The Court in *Roberts* nonetheless found the case distinguishable from *Malley*, saying "the policy decisions underlying a grant of immunity focus on the function or role an individual fulfills in performing certain acts, not on the acts alone" (104 F.3d at 321), without ever identifying any respect in which the defendant investigator's actions, or their function, differed from those of the defendant police officer in *Malley*. It is *Roberts*, not this case, that is confused and inconsistent with this Court's precedents.

IV. THERE IS NO GOOD REASON TO EXTEND ABSOLUTE IMMUNITY TO PROSECUTORS WHO ACT AS COMPLAINING WITNESSES.

This Court has repeatedly said that the scope of absolute immunity from civil rights suits is not subject to "freewheeling policy choice[s]." *Buckley v. Fitzsimmons*, 509 U.S. at 268; *quoting Malley v. Briggs*, 475 U.S. at 342. *See Wyatt v. Cole*, 504 U.S. at 170 (concurring opinion of Justice Kennedy). Despite that, Petitioner and her fellow prosecutor/*amici* repeatedly raise the specter of crippled law enforcement in the hope of persuading the Court to expand their power to incarcerate citizens without fear of legal recourse.[23] At best, their arguments appear to be based in a misunderstanding, or a distrust, of the narrow scope of the decisions below. At worst, they are seriously exaggerated. There are many answers to their purported concerns.

1. The most obvious reason the decision below poses no threat to prosecutors is that there is no need for prosecutors to act as complaining witnesses, and few do. As the Solicitor General acknowledges, "federal prosecutors typically do not personally attest to the facts set forth in a complaint . . . or in an affidavit filed in support of an application for an arrest warrant. . . . " Brief for the United States as Amicus Curiae at 7. Neither do prosecutors in most jurisdictions, as far as we can ascertain. *See* note 12, above. Even Washington law does not require

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[23] *See* Petitioner's Brief at 25-29; Brief for the United States as Amicus Curiae at 21-24); Brief of the Washington Counties at 10-13; Brief of National District Attorneys Association at 9-10; Brief of National Association of Counties, et al., at 20-27.

this function to be performed by a prosecutor. *See* page 20-21, above; JA 27.

There is no legal reason that prosecutors cannot leave this function to the police, who have traditionally performed it. It would not even constitute a serious administrative inconvenience for them to do so: As the record here demonstrates (*see* note 1, above), sworn police reports are routinely available to prosecutors, and can themselves be easily submitted to the court for its independent review. Utilizing police reports thus carries little if any cost, preserves intact the prosecutor's absolute immunity, and has the beneficial effect of reducing the chance of error through miscommunication and providing the innocent citizen with legal recourse in the event of knowing falsehood. That is a far cry from the doomsday scenario portrayed by Petitioner and some of her *amici*.

2. Prosecutors who for some reason don't wish to rely on the police can still avoid liability by utilizing a summons procedure such as that authorized by Wash. CrR 2.2(b), rather than an arrest warrant, to obtain jurisdiction over a criminal defendant. Although the law on this is not settled, it appears that allegations of abuse of the summons process do not support a claim under §1983. *Albright v. Oliver*, 510 U.S. 266 (1994).

3. Even if prosecutors choose to have defendants arrested and to act as the complaining witnesses, their amenability to lawsuits for abuses in that role should cause little distraction from their duties. Unlike a lawsuit which challenges a charging decision or the conduct of a trial, a lawsuit alleging false statements in an arrest warrant affidavit is, by its nature, focused and specific; such

suits pose scant threat of becoming "a virtual retrial of the criminal offense in a new forum. . . . " *Imbler v. Pachtman*, 424 U.S. at 425.

Nor are such lawsuits likely to be common, if prosecutors act responsibly. The experience in Washington state, where prosecutors have prepared certificates of probable cause for decades (*see* Brief of 39 Washington Counties at 2-3), bears this out: this is the only such case ever reported. Nationally, there is only one other reported case (*Kohl*) involving a prosecuting attorney[24] sued federally for performing this function.

It is inconceivable that such an attenuated threat of a lawsuit – a lawsuit in which they will enjoy the protection of qualified immunity – will significantly impede or distract prosecutors who choose to expose themselves to that threat by performing this function. That is particularly so because the function at least theoretically carries with it the potential penalty of perjury, and disciplinary action[25] – in addition to the risk of losing a case and freeing a guilty defendant – for knowing abuse. It is simply not credible to argue that fear of lawsuits like this one justifies an exception to the usual assumption that qualified immunity provides ample protection for conscientious officials. *See Malley v. Briggs*, 475 U.S. at 341.

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[24] The other two reported federal decisions addressing this issue, *Roberts* and *Ireland*, involved prosecutors' investigators. *See* page 29, above.

[25] See RCW 9A.72.040 (false swearing); Washington Rule of Professional Conduct 3.3 (candor toward tribunals).

4. On the other hand, extending absolute immunity to prosecutors who take on the role of witnesses, as well as advocates, would set a truly dangerous precedent for citizens. It would give innocent people who are wrongfully seized and jailed no realistic legal recourse,[26] for even flagrant abuses of power. In principle, it seems a huge risk of freedom to give executive officials the power both to state the facts as a witness and to argue the law as

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[26] The arguments of Petitioner's *amici* regarding the efficacy of other methods of control of prosecutorial abuses (*e.g.*, Brief of the United States at 23-4, Brief of the National Association of Counties at 24) blink reality. The reality is reflected in this case: although Ms. Kalina plainly made false statements under oath in a document filed with the court, she has been subjected to no discipline and the responsible prosecuting attorney's office (her own) is defending her, not prosecuting her. That is hardly surprising. We have not found a single reported Washington case of bar discipline or criminal prosecution for acts of prosecutorial misconduct.

Moreover, it is worth noting that the differences between prosecutors, private lawyers, and police, with regard to professional regulation, *see Imbler v. Pachtman*, 424 U.S. at 429 n.30, have narrowed in the decades since *Imbler*. Private lawyers are no less subject to bar discipline, and court sanctions, than are prosecutors, and are certainly more likely to be prosecuted for criminal conduct in relation to their practices; but they are afforded no immunity from Section 1983 liability at all. *Wyatt v. Cole, supra*. In recent years police officers have commonly become subject to administrative review and discipline as well. *See* Seattle Police Department Manual of Policies and Procedures § 1.09; "Citizen Review of the Police, 1994: A National Survey," Police Executive Research Forum, January, 1995. Yet, under *Malley*, they are entitled only to qualified immunity for the conduct engaged in by Petitioner here.

an advocate for revocation of a citizen's liberty,[27] and exempt them from liability for any manner of abuse in so doing. It surely does not counsel in favor of taking that risk that, in fact, this unchecked power would be given to some 2,350 prosecutors' offices nationwide, staffed by untold thousands of overworked and undersupervised government lawyers. *See* Brief of National District Attorneys Association at 9-10.

Certainly, there is no reason to believe that was the policy choice of the Congress of 1871. Its choice was to provide citizens like Rodney Fletcher legal recourse against "every person" who caused them to be denied their constitutional rights under color of state law. Neither precedent nor policy justifies an exception to that rule here.

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[27] *See generally* Y. Feofanov, Politics and Justice in Russia: Major Trials of the Post Stalin Era (Barry Trans. 1996).

CONCLUSION

The decisions below should be affirmed.

Respectfully submitted,

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